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CAPITAL CASE No. 10-855

IN THE

Supreme Court of the United States

MILTON W. MATHIS,

Petitioner,

v.

RICK THALER,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN A. DOGGETT
201 South Eleventh Street
Richmond, TX 77469
(281) 342-3321

LEE B. KOVARSKY
Counsel of Record
CLAUDIA WILSON FROST
DAWN M. JENKINS
Pillsbury Winthrop Shaw Pittman LLP
909 Fannin St., Suite 2000
Houston, TX 77002
(713) 276-7600
lee.kovarsky@pillsburylaw.com

Counsel for Petitioner

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Section 2244(b)(2)(A) "availability" holdings are usually unreviewable because they ordinarily issue in § 2244(b)(3) authorization proceedings, but *Mathis* arises in a unique, post-authorization procedural posture that allows the Court to clarify circuit confusion over how to process new constitutional rules asserted in successive habeas petitions. Moreover, *Mathis* is an ideal vehicle because the practical obstacles to including his mental retardation (MR) claim in his initial petition rendered that claim unavailable in all but the most formalistic sense.

The Director *still* cannot effectively articulate what Mr. Mathis could have done to assert his MR claim without gravely risking forfeiture of his non-MR claims as untimely. When Mr. Mathis did not file his MR claim until June 20, 2003, he was not "dawdling" or "strategizing." Resp't Br. Opp. ("BIO") at 4, 9. He did not file because Texas had a categorical bar against co-pending state and federal collateral attacks. Cert. Pet. at 8. In 2002-03, the Director acknowledged the Hobson's choice, taking the positions that: (1) the Two-Forum Rule (TFR) barred a state MR filling and (2) the Director's limitations defense against non-MR claims would apply unless waived, because state MR proceedings would not toll the separate limitations period applicable to non-MR claims. App. 232a-234a. In fact, the Director contin-

ues to threaten these positions in litigation today.[1] The Court should not allow this shifting advocacy in capital cases.

The Director's first theory is that Mr. Mathis should have filed his state *Atkins* petition during the pendency of his initial federal petition. Suffice it to say that even the courts below have recognized that the TFR prohibited such a filing. The Director's fallback TFR position is that Mr. Mathis might have filed his state petition in or before March of 2003. That suggestion (1) ignores the Fifth Circuit's holding that Texas *had no state* Atkins *remedy* at that time, (2) assumes without citation that the categorical Texas bar against co-pendency was not categorical if a prisoner filed his state petition first, and (3) is contrary to the position the Director took in 2003 and takes in other proceedings today. If Mr. Mathis filed his state *Atkins* petition first, then the TFR would have required the TCCA to dismiss it as soon as he filed his federal petition (which it ultimately did). At that point, Mr. Mathis would have confronted the same Hobson's choice he faced before the futile filing, with the same amount of time left on his limitations period. He sought state habeas relief on June 20 in spite of the filing's futility because, after that date, his state filing would have been futile *and* he would have forfeited the timeliness of his federal claim.

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[1] See *Martinez* v. *Quarterman*, No. 7:07-cv-00127, Dkt. No. 5, at 2 (S.D. Tex filed June 28, 2007) (stating that the Director "indicated to counsel that he might assert an untimeliness bar" unless the prisoner filed his initial petition within the one-year limitations period specified by § 2244(d)(1)(A), despite the pendency of a successive state *Atkins* petition).

The Director's second theory is that Mr. Mathis should have withheld or withdrawn his non-MR claims while he exhausted the MR claim in state court. The Director actually implies that Mr. Mathis should have delayed his non-MR claims in anticipation of obtaining a favorable cross-provision tolling decision in the Fifth Circuit—a ruling that would have tolled the § 2244(d)(1)(A) limitations period for non-MR claims while he sought TCCA authorization to exhaust his MR claim. For the reasons set forth in Part B, *infra*, no reasonable lawyer would have adopted that strategy.

Mr. Mathis took the one way out of this Hobson's choice. Immediately after the TCCA modified the TFR, Mr. Mathis made a timely motion for a stay under FED. R. CIV. P. 59.[2] The Director expressly concedes that the district court botched its reading of the TFR and denied the stay. BIO at 11. It erroneously believed that the stay was unnecessary for Mr. Mathis to pursue state *Atkins* relief. The TCCA promptly dismissed the *Atkins* petition under the modified TFR. If the stay had issued, Mr. Mathis's

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[2] The Director implies that the district court had lesser power to allow Mr. Mathis to amend the petition and add the *Atkins* claim because Mr. Mathis asked for such amendment in a timely Rule 59(e) motion. BIO at 11-12. The unsupported implication is wrong. See *Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (holding that erroneous refusal to grant leave to amend complaint on Rule 59(e) motion was an abuse of discretion); *Ross* v. *Marshall*, 426 F.3d 745, 752 (5th Cir. 2005) (explaining that district court retains full power over case after judgment and until it denies Rule 59(e) motion).

MR claim would not have been untimely and would not have appeared in a successive petition.

The Director's concluding argument—that this Court's intervention is unnecessary because the Texas MR proceeding was "full and fair"—is both beside the point and wrong. Mr. Mathis's entitlement to *Atkins* relief turns not on the integrity of state procedure, but on whether the state decision was legally and factually reasonable. See 28 U.S.C. § 2254(d). Nor does the state process inspire confidence in its result. First, the Director omits reference to the two Wechsler IQ scores (62 and 64) upon which the Fifth Circuit based its authorization (the 62 was obtained on a test the Director administered). App. 129a; see *In re Mathis*, 483 F.3d 395, 397 (5th Cir. 2007). Second, the Director presented no expert testimony at the state hearing. Third, the state court did not memorialize any judicial inquiry—it simply signed the findings proposed by the State. Fourth, those findings therefore represent a bizarre catalogue of observations that eschew clinical inquiry.[3] Fifth, the Director misstates fundamental record material, such as the timing and source of IQ scores. See Part

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[3] See, e.g., App. 106a ¶¶ 112-113 (basing intelligence determination partially on his ability to lie); App. 108a ¶ 133 (observing that babysitting was inconsistent with MR); App. 110a ¶ 146 ("Applicant's conduct in stealing dogs demonstrated forethought, planning, and complex execution of purpose."); App. 111a ¶ 155 ("Applicant was having sexual relations with more than one woman."); App. 116a (stating that *Atkins* is inapplicable unless there is "a national or statewide consensus of citizens that [Mr. Mathis] lacks the moral culpability to receive the death penalty") (citation omitted).

D, *infra*. Even if the Court denies certiorari and allows Texas to execute Mr. Mathis, it cannot indulge the fiction that the state process was reliable.

A. In light of this case's unique procedural posture, certiorari should issue to address divergent interpretation of § 2244(b)(2)(A).

1. This case is an ideal procedural vehicle for interpreting § 2244(b)(2)(A) because the Court's review of the provision is ordinarily barred. In the *overwhelming* number of cases, an appeals panel decides availability on a motion for authorization under § 2244(b)(3), a posture in which this Court may not conduct certiorari review. See § 2244(b)(3)(E). The formalistic availability interpretations in the Fourth and Seventh Circuits issued in that posture. See *In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004); *Bennett* v. *United States*, 119 F.3d 470, 470-71 (7th Cir. 1997). That formalism allows the availability inquiry to be resolved in authorization proceedings, and the Court will be unable to clarify the statute in those cases. *Mathis*, by contrast, is reviewable because the petition has been authorized and because the courts below ruled on availability. The Court therefore enjoys rare certiorari jurisdiction over this issue.

2. *Mathis* will be one of the last *Atkins* cases presenting this question before the next new constitutional rule is announced. The availability issue arises for prisoners who must file their initial federal petitions during the § 2244(d)(1)(C) limitations period applicable to a new rule. Because *Atkins* was decided in 2002, there are few such MR claimants left. Decid-

ing the availability issue now will provide badly-needed clarity the next time the Court announces a new rule implicating these same questions.

3. There is no § 2244(b)(2)(A) vehicle problem associated with the limitations issue because its resolution would follow the resolution of availability. The Court is highly unlikely to find that the external filing obstacles rendered the claim unavailable under § 2244(b)(2)(A) but that they were not extraordinary circumstances under the equitable tolling inquiry.

B. The MR claim was not available to Mr. Mathis when he filed his initial petition.

When the federal limitations period applicable to his non-MR claims was closing, Mr. Mathis could not be certain that his *Atkins* authorization request pending before the TCCA would toll it. The MR claim was subject to a § 2244(d)(1)(C) limitations period, and the non-MR claims were subject to a separate limitations period under § 2244(d)(1)(A). If he withdrew or withheld his non-MR claims while exhausting his MR claim, Mr. Mathis would have been betting that: (1) the pendency of his state *Atkins* litigation would toll not only the Subsection (d)(1)(C) limitations period applicable to that claim, but also the Subsection (d)(1)(A) limitations period applicable to the non-MR claims; and (2) his successive state *Atkins* petition would be considered "properly filed" and "pending" with respect to the non-MR claims, even if the TCCA denied him authorization to file it. Neither the Fifth Circuit nor this Court has validated either theory. If either argument failed in the Fifth Circuit, then Mr. Mathis would have forfeited

his non-MR claims while he waited for the TCCA to authorize his successive state *Atkins* petition. No diligent attorney would have withheld the filing of a federal petition if the client faced this risk.

As a prefatory matter, the Director again speculates that Mr. Mathis did not file his state *Atkins* petition during the pendency of the initial federal petition because he was dilatory or to secure a tactical edge. BIO at 4, 9. In reality, he did not file a state *Atkins* petition at this time for the more straightforward reason explained at length in the introduction to this Reply: because the TFR did not allow him to do so. See also Cert. Pet. at 7-14 (explaining the role of the TFR in the Hobson's choice).

1. No reasonable lawyer would have delayed filing of the non-MR claims in hopes of securing cross-provision tolling from the Fifth Circuit. Cross-provision tolling would mean that, whenever this Court announces a new constitutional rule, a state prisoner could use it to postpone all federal challenges to his conviction and sentence—even those available when the conviction became final. The Director's argument that cross-provision tolling was clearly available rests on a hyper-selective emphasis of language in § 2244(d)(2), which states that a § 2244(d)(1) limitations period is tolled during the pendency of a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim[.]" The BIO selectively italicizes "with respect to the pertinent judgment" but conspicuously fails to italicize "or claim." The phrase "or claim" is the source of the

statutory ambiguity. Mr. Mathis reasonably feared that the Fifth Circuit would decide that the tolling mechanism follows the limitations trigger—that post-conviction litigation of a particular claim only tolls the limitations statute for other claims subject to the same Subsection of § 2244(d)(1). (This is the only reading that gives both "judgment" and "claim" independent statutory effect.) If a court adopted that interpretation and Mr. Mathis had withdrawn or withheld his non-MR claims, then those claims would have been barred as untimely in any federal petition filed after May 14, 2003.

The balance of the Director's argument is a lengthy non-sequiter. He protests that "it is unheard of for a federal habeas court to limit [the tolling provision] to specific claims" in the state post-conviction proceedings—which is not Mr. Mathis's argument. He then cites a slew of cases that address another completely separate question: what kind of state post-conviction litigation involving a claim *available when the conviction becomes final* tolls the § 2244(d)(1)(A) limitations period for *other claims available at that time*. BIO at 8. *Atkins* implicates a different question because the claim's limitation period is not triggered by a final conviction under Subsection (d)(1)(A), but by a subsequent Supreme Court decision under Subsection (d)(1)(C). The absence of cross-provision tolling is not an "unheard of" position; the Director took it in 2002 and threatens it in other litigation today.

2. The Director also argues that Mr. Mathis should have been willing to gamble that the pend-

pendency of his TCCA authorization would toll the limitations period for his non-MR claims because a dismissed authorization request would have been considered "properly filed" under *Artuz* v. *Bennett*, 531 U.S. 4 (2000). *Artuz* stands for the proposition that statutory tolling is available when a filing is dismissed pursuant to a condition to relief, but that there is no tolling when the petition is dismissed pursuant to a condition to filing. See id. at 10-11. The BIO omits reference to *Villegas* v. *Johnson*, 184 F.3d 467 (5th Cir. 1999), the Fifth Circuit case that *Artuz* cites with approval. See *Artuz*, 531 U.S. at 8. Because the TCCA must authorize successive *Atkins* litigation, a lawyer reading *Villegas* in 2003 would understand that the filing of a state petition requiring such authorization would not toll the federal limitations period *in a capital case* (non-capital cases require no authorization). See Cert. Pet. at 27-28. The salient question is not whether all state successive petition rules are conditions for relief; what renders the relevant Texas provision a "condition to filing" under *Artuz* is the fact that the TCCA had to authorize the successive litigation.

C. Certiorari should issue to resolve confusion over whether the Hobson's choice or federal judicial error is an "extraordinary circumstance" for equitable tolling purposes.

If the *Atkins* claim was not available under § 2244(b)(2)(A), then the circumstances rendering it unavailable certainly qualify as "extraordinary" under the tolling inquiry. With respect to circuit confusion over the limitations provision, the Director

states that the Court need "only read the opinion" in *White v. Dingle*, 616 F.3d 844 (8th Cir. 2010), to see that that Mr. Mathis is "concocting" the split. BIO at 16. The Director then fails to explain what Mr. Mathis concocted, instead pointing to a distinction in procedural posture that has no bearing on the legally significant question. Specifically, the Director argues that *White* and *Mathis* materially differ because the district court here was "under no legal obligation" to stay Mr. Mathis's initial federal habeas proceedings. BIO at 18. The Eighth Circuit, however, had been under no legal obligation to supply the requested remand instruction—even though that instruction was necessary to eliminate the Hobson's choice that *Lundy's* full exhaustion rule and the federal limitations statute created. See *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *White*, 616 F.3d at 848-49. *White* and *Mathis* decide the same legal issue—whether a federal court's failure to discretionarily correct the Hobson's choice was an extraordinary circumstance that warrants equitable tolling.

D. Mr. Mathis is entitled to *Atkins* relief, and his state proceedings were unreliable.

1. Mr. Mathis has a strong MR claim. The IQ cutoff for MR is between 70 and 75. See *Atkins* v. *Virginia*, 536 U.S. 304, 309 n.5 (2002). The BIO omits reference to two of Mr. Mathis's IQ scores that are not borderline—a 62 and a 64 on two highly-respected intellectual assessment instruments. Mr. Mathis received a full-scale IQ score of 64 on a WAIS-III test, the gold standard in modern intelligence assessment. See *Atkins*, 536 U.S. at 309 n.5

(describing the WAIS-III as the standard instrument in the United States for assessing intellectual functioning); *Rivera* v. *Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) (noting the Director's agreement that the WAIS-III is "the best full-scale IQ test available in English"). Mr. Mathis received a 64 on an IQ test that *the Director administered* two years before *Atkins* was even decided. App. 129a. The Fifth Circuit authorized the federal proceedings on the basis of these two scores. See *In re Mathis*, 483 F.3d at 397.[4]

The Director's statement that Mr. Mathis' pretrial IQ scores "comfortably exceed" the MR threshold underscores the problems with present scrutiny of the claim because the Director misrepresents the record. On the first page of his BIO, the Director describes a 79 that Mr. Mathis received on a broadly-discredited 1991 WISC-R test as score that Mr. Mathis procured during his trial preparation. App. 166a; BIO at 1, 20.[5] The timing of the test is important because it was *before* Mr. Mathis began to abuse the fry that severely impaired his intellectual functioning during adolescence. App. 169a-174a.

2. The limitation on federal relief does not turn on whether state adjudication was "full and fair." A prisoner is entitled to federal relief if the state *deci-*

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[4] In the order authorizing the federal petition, the Fifth Circuit remarked that "both sides have expert opinions on whether or not Mathis is retarded based on the available evidence[.]" *In re Mathis*, 438 F.3d at 399. The State, however, produced no such expert opinion.

[5] The expert testimony that the 1991 WISC-R tests skew 9 points high was not rebutted in any proceeding.

sion was legally or factually unreasonable, without respect to the procedural integrity of the state proceeding. See § 2254(d). Even so, the procedural flaws in the state adjudication are worth mentioning. The Director presented no testimony, expert or otherwise, at Mr. Mathis's state *Atkins* hearing. A clinical psychologist with extensive forensic evaluation experience carefully constructed confidence intervals taking all three IQ tests as inputs. App. 130a. She concluded that, even considering the margin of error, Mr. Mathis undoubtedly has MR. App. 127a. The state court ignored that analysis and relied on the 79 obtained on the 1991 test. In fact, the state court simply signed the findings that the State's attorney submitted; the decision embodies no independent judicial inquiry.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN A. DOGGETT
201 South Eleventh Street
Richmond, TX 77469
(281) 342-3321

LEE B. KOVARSKY
Counsel of Record
CLAUDIA WILSON FROST
DAWN M. JENKINS
Pillsbury Winthrop Shaw Pittman LLP
909 Fannin St., Suite 2000
Houston, TX 77002
(713) 276-7600
lee.kovarsky@pillsburylaw.com

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